Big Fish To Fry – International Law and Deterrence of the Toothfish Pirates

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1. Introduction

In August 2003 the Australian public was given a daily account via all news media of the discovery, pursuit, and eventual seizure, of an alleged illegal, unreported and unregulated (IUU) fishing vessel out of Uruguay — the *Viarsa* (ABC News Online 2003; see also News24.com 2003).[1] The vessel had been found to be fishing in the remote Australian Fishing Zone that surrounds Australia's sub-Antarctic Heard and McDonald Islands (HIMI) (ABC News Online 2005; News24.com 2003).[2] The *Viarsa* was subsequently chased through 10 metre waves, 80-knot winds, and temperatures as low as -20° Celsius, for 6,300 kilometres over 21 days, (the longest maritime chase in Australian history). The vessel was eventually captured in the South Atlantic Ocean on Thursday 21st August, 2003.[3] The *Viarsa*, carrying 85 tonnes of Patagonian toothfish, was escorted to Fremantle for trial.

Under contemporary international law, the captain and crew of the *Viarsa* were entitled to certain rights which are outlined in Article 73 of the 1982 United Nations Law of the Sea Convention (LOSC).[4] This paper will submit that the current provisions within Article 73 of the LOSC have no deterrence value. Thus, in January 2004, less than six months after the *Viarsa* was arrested, another Uruguayan vessel, the *Maya 5* with 200 tonnes of unreported toothfish, was also arrested for illegally fishing in the Australian Fishing Zone. In the southern hemisphere summer of 2005, the problems of IUU fishing have continued to undermine sustainable fishery management quotas. At the time of writing this paper (March 2005), Australia's Southern Ocean patrol vessel the *Oceanic Viking* has just reported observing six IUU fishing vessels operating on the Banzare Bank between HIMI and the

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1 A chronological list of media references has been compiled by the Coalition of Legal Toothfish Operators (COLTO) and is available at their website. Refer: <www.colto.org/Viarsa_Chase.htm>, accessed 11th March, 2005

2 Note also the use of the term Australian Fishing Zone. This is the terminology used by the Australian *Fisheries Management Act* 1991 with regard to Commonwealth fisheries such as the Patagonian Toothfish. In most other instances the terminology was replaced in 1994 with the term Exclusive Economic Zone (EEZ).

3 Ibid.

4 United Nations Convention on the Law of the Sea (done at Montego Bay, Jamaica) 10th December, 1982, and entering into force on the 16th November, 1994. Reprinted in (1982) *International Legal Materials*, vol 21, pp 1261-1354.

Antarctic ice shelf (MacDonald & Ellison 2005).[5] These are waters that are regulated by the relevant regional fishery body of which Australia is a member: the Committee for the Conservation of Antarctic Marine Living Resources (CCAMLR),[6] and the CCAMLR had already closed the Banzare Bank to fishing on 14th February, 2005 (MacDonald & Ellison 2005).

The problem of IUU fishing is not confined to pockets within the Southern Ocean. It is a global phenomenon and accordingly, attempts to understand the practice and deter the fishers have taken place across many disciplines,[7] at all geopolitical levels: global, regional and national.[8] This paper takes one such discipline and one geopolitical level, that is, international law. The paper will evaluate the practical application of international law to IUU fishing, assess the Law of the Sea Convention for its ability to deter potential IUU fishers, and make recommendations to enhance the subject of deterrence in the current legal regime.

2.IUU Fishing and the Toothfish Vessel Seizures

Illegal, Unreported and Unregulated fishing (IUU) is the term applied to foreign vessels fishing without authorization in the waters of a coastal State, or vessels which fish without authorization in an area and for a species governed by a (multilateral) regional fishery body.[9] Such vessels either fail to report their catches, or misreport their catches.[10] IUU fishing is a major problem worldwide, and is considered by the United Nations to be the single major obstacle to achieving sustainable fisheries in both areas under national jurisdiction and on the high seas (Secretary General of the United Nations 2004). Put simply, how can governments legislate, or regional fishery bodies regulate, to sustainably

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5 The six vessels are: three Togo flagged vessels: the *Hammer*, the *Ross* and the *Condor*, plus three Georgian flagged vessels: the *Kang Yuan*, the *Jian Yuan* and the *Koko*.

6 CCAMLR came into existence in 1982 as part of the Antarctic Treaty System. Its geographical jurisdiction is a biological boundary rather than a legal or political boundary. This boundary is south of the Antarctic Convergence which is approx. 45°S. CCAMLR members at March 2005 are Argentina, Australia, Belgium, Brazil, Chile, European Community, France, Germany, India, Italy, Japan, Republic of Korea, Namibia, New Zealand, Norway, Poland, Russia, South Africa, Spain, Ukraine, United Kingdom, United States and Uruguay. A further seven States are States party to the CCAMLR Convention, but not Members.

7 At the University of Tasmania and its Antarctic Climate Change and Ecosystem CRC, postgraduate research into IUU fishing has occurred from a scientific, sociological, meteorological, mathematical, political, philosophical, creative writing, environmental science, geographic, economic and legal focus. The University prioritises theme areas of research and the problem of IUU fishing clearly sits in the thematic grouping of Antarctic and Marine Studies.

8 Examples may be given: at the international organization level, IUU fishing has been the subject of OECD and UNFAO workshops, meetings and conferences. At the regional level, CCAMLR has implemented a Catch Documentation Scheme (CDS) which came into effect on 7th May, 2000. The Scheme aims to better monitor the international flow of toothfish products and reserve market access for those operators who comply with regional (CCAMLR) management objectives. This trade-based regulation measure has been adopted by other regional fishery bodies including the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT). Australian national initiatives include the provision of armed enforcement in the Southern Ocean through the AUS$90 million *Ocean Viking* as a deterrent to IUU fishing.

9 Article 3, United Nations Food and Agriculture Organization (FAO) International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). The IPOA –IUU was adopted by consensus at the Twenty-Fourth Session of COFI on 2nd March 2001 and endorsed by the Hundred and Twentieth Session of the FAO Council on 23rd June 2001. Available through Legal Materials at: <http://www.fao.org>.

10 Ibid.

manage their fish stocks, if their management plans are constantly being undermined by an increasing number of operators who fish outside the legal regime and with no respect for quotas?

A substantial part of the international IUU fleet targets the Patagonian Toothfish (*Dissostichus eleginoides*) in the Southern Ocean, particularly around the remote Australian external territories of Heard and McDonald Islands (HIMI). These illegal fishers have been dubbed by the Australian Media as 'Toothfish Pirates'(for e.g. ABC TV 2002).[11] There is no real way of knowing the quantity of the catch taken by the 'pirates', however an Australian Antarctic Division (AAD) Report estimates that the catch of toothfish by IUU operators is almost equal to the catch by legal fishers (Southern Ocean Conservation Unit nd).[12] The AAD Report values the total IUU toothfish catch at $1 Billion wholesale (Southern Ocean Conservation Unit nd). This trend has not abated, and if anything, IUU fishing in the Southern Ocean has increased. There are significantly more IUU sightings than seizures in the Australian Fishing Zone, a consequence of the sheer size of the zone which is the third largest in the world, and a lack of Australian response resources in the vicinity of the sightings (Davis 2000).

To date, Australian authorities have arrested eight foreign fishing vessels which have been detected fishing illegally for Patagonian toothfish in the Australian Fishing Zone. The value of the combined catches on the eight vessels is in the vicinity of $10 million. The environmental cost of the illegal industry includes not only overfishing of the target catch itself, but also the capture on fishing longlines of the endangered albatross. Some brief information may be given on the biological status of the toothfish and the albatross.

There are two species of Toothfish living in the Southern Ocean: the Patagonian Toothfish and the Antarctic Toothfish. The latter is found closer to the Antarctic continent where sea ice forms and for this reason it has not been subjected to the harvesting levels of the Patagonian Toothfish (Williams & Trebilco nd; see also Agnew 2000). Both the population status and stock dispersal of the Patagonian Toothfish are still uncertain, and this uncertainty increases the need for precaution in quota management. They are a large fish reaching more than two metres in length. They reach maturity later than most fish (between 10-12 years) and they have low fecundity. These biological factors make the Patagonian toothfish extremely susceptible to any variations in population numbers.

The Southern Ocean seabirds most affected by longline fishing practices are species of albatross and petrels. Although remote breeding sites now tend to protect their land-based contact with humans, their unique gliding capacity enables them to traverse huge ocean distances, and it is likely that most of these birds will interact with longline fishing vessels at some stage in their lives (Robertson & Gales 1997). In 1997 all of the world's albatross species were added to the list of protected species under the Convention on Migratory Species (American Bird Conservancy nd).[13] Seabird mortality rates from fishing vessels can only be estimated due to lack of any data from the IUU fishing vessels (Robertson &

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11 Despite its popular useage, the term is actually misleading as 'piracy' is a legal term defined in Article 101 of the 1982 Law of the Sea Convention.

12 The Report cites the catch of toothfish over the past 6 years as being 80,960 tonnes of IUU catch, and 83,696 tonnes of legal catch.

13 Most of the seabirds that are at risk reproduce slowly. The albatross breeds only once in every two years, with one egg laid in a clutch. It takes nine months to fledge this chick which depends on intensive care from both parents. The albatross mates for life, and if one of the pair is killed, it frequently takes several years for another breeding bond to be formed. Such low reproductive rates, combined with long life spans and delayed sexual maturity, cause the bird populations to be sensitive to any changes in adult survival ratios.

Gales 1997:10). A 2000 New Zealand Government Report estimates that 30,000 to 40,000 albatrosses were being killed annually by legal longline vessels before the introduction of seabird mitigation fishing techniques (Baird 2001).[14] Such mitigation fishing techniques are not employed by IUU vessels which are estimated to have killed between 50,000 and 90,000 birds in 2002 alone (Gales 2002:5).

A summary of the eight seized IUU fishing vessels is provided below (Bache & Lugten 2003).[15]

Table One:
Summary of IUU vessels apprehended in the AFZ and penalties imposed

Vessel name	Flag state/ vessel owner	Date of arrest	Estimated value of catch	Bail and fines imposed	Fate of vessel, gear and catch
Salvora	Belize / Clayton Trading Co. Uruguay	16 October 1997	$178,571	Captain and Fishing Master fined $50,000 each ($25,000 for each offence).	Vessel, catch and gear forfeited (value $1,077,478). Vessel released on bond. Vessel not returned - bond $1.47 million forfeited.
Aliza Glacial	Panama / Norway	17 October 1997	$250,000 (21 tonnes)	Captain and Fishing Master failed to appear to answer charges.	Mortgagee action in Admiralty Law. Commonwealth legal costs paid from proceeds of sale. Vessel valued at $8 million.
Big Star	Seychelles / Big Star Internation. Corp	21 February 1998	$ 1.5 million (145 tonnes)	Master fined $100,000. This was reduced on appeal to $24,000.	Vessel, catch and gear forfeited. Vessel released on bond and not returned - bond $1.5 million forfeited.
South Tomi	Togo / Not disclosed	12 April 2001	$1.5-1.6 million (116 tonnes)	Master fined $136.000.	Catch and gear forfeited. Bond not set as owner's identity not divulged by lawyers. Vessel forfeited, to be disposed of at direction of Minister.
Lena	Russia / Alitas	6 February 2002	$900,000 (70-80 tonnes)	Captain fined $50,000. First Officer and Officer fined a total $25,000 each.	Vessel, catch and gear forfeited. Bond not set as owner's identity not divulged by lawyers,. Vessel forfeited, to be disposed of at direction of Minister.

14 Note that inexpensive seabird mitigation techniques include flying plastic streamers above the fishing longlines which will flutter in the wind and scare the birds; fishing at night; fishing with lead-weighted lines so that the longlines sink faster and become out of reach of the diving seabirds; throwing offal from the front of a vessel while baited longlines are being released from the back of a vessel.

15 This table, without the most recent Maya V data, is taken from a paper presented at the UNFAO Deep Seas Conference held in Queenstown, New Zealand in December 2003. Written Papers from that workshop are with UNFAO but remain unpublished. Further information can be obtained by emailing the author of this paper.

Volga	Russia / Alitas	7 February 2002	$1.6 million (127-138 tonnes)	Charges against Captain withdrawn. Fishing Master, Fishing pilot and Chief Mate charged.	International determination such that bond may be set as equal to the value of the vessel. (Note elaboration below)
Viarsa	Uruguay	27 August 2003	$1 million	Ongoing	Ongoing On 2nd December, 2004 the jury trying five crew members was dismissed after failing to reach a verdict at the end of a four-day deliberation and a nine-week trial. Awaiting now a Status Conference on whether to proceed with a new trial.
Maya 5	Uruguay	23 January 2004	$3 million	Captain and Fishing Master fined $30,000 each. Crew fined $1,000 each.	Vessel catch and gear forfeited. Vessel currently used as a training vessel for Customs.

3.The 1982 Law of the Sea Convention

The primary legal framework for the regulation of fishing by foreign nationals and their vessels in the waters of a coastal State is to be found in the 1982 Law of the Sea Convention. In brief, the 1982 Convention gives to a coastal State broad enforcement powers to regulate its exclusive fishing zone. Thus Article 73(1) provides that a coastal State may:

> in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

However, subsequent paragraphs in Article 73 list some limitations on the paragraph (1) broad enforcement powers. That is, there must be:

- Prompt release of arrested vessels and their crews upon the posting of a reasonable bond or other security (Article 73(2));

- No imprisonment of foreign nationals in the absence of agreements to the contrary by the States concerned, and no application of corporal punishment (Article 73(3)); and

- Prompt notification to the flag State of an arrested or detained foreign vessel as to the action taken and penalties imposed (Article 73(4)).

In addition to Article 73, attention must be given to the Law of the Sea Convention provisions in Article 292 — Prompt Release of Vessels and Crew. This article provides that where a State detains a vessel and does not comply with the Article 73 requirements for prompt release of the vessel and its crew upon the posting of a reasonable bond, then the

matter of release from detention can be submitted to an international court or tribunal. The relevance and application of this provision will become apparent later in this paper in an elaboration of one IUU fishing case: the *Volga*.

The 1982 Law of the Sea Convention came into force on 16th November, 1994.[16] It is the product of 2,000 years of customary law evolution, combined with two previous United Nations Conferences on the Law of the Sea (UNCLOS I in 1958, and UNCLOS II in 1960). Furthermore, it took another ten years of intense negotiations to compile the 1982 Convention. Currently, one hundred and forty-seven States have ratified the 1982 Law of the Sea Convention.[17] However, this impressive pedigree, and widespread support cannot hide the fact that by the time the Convention entered into force in 1994, it was already outdated in many significant provisions (Lugten 1999). This paper submits that Article 73 is one such provision.

When read as a whole, Article 73 seems to set the sovereign rights of the coastal state in conflict with the rights of illegal fishers. Furthermore, from Article 73 paragraphs (2), (3) and (4), the overall implication of the provision is that the rights of arrested vessels, crews and flag states are more important than coastal state sovereignty. This interpretation would not be either impossible or improbable considering the period of drafting the Law of the Sea Convention. To begin with, the 1970s saw coastal states rewarded with an extra zone of economic jurisdiction — the 200-mile Exclusive Economic Zone. It was also an era that predated large-scale IUU fishing.[18] In fact, it even predated our current knowledge of the crisis confronting global fish stocks due to overfishing.[19] For contemporary fish managers trying to work within the framework of the Law of the Sea Convention, the direct result of a 'lenient' Article 73 is that there is no deterrence element in the law.

A detailed examination of the eight IUU fishing cases is beyond the scope of this work, however, from the court proceedings conducted at the District Court of Western Australia, the IUU fishing cases are all notable for three issues:

1. Despite clear scientific evidence on the problems of overfishing and the need to apply sustainable management practices to the toothfish fishery, the deleterious impact of IUU fishing on the environment itself (including seabirds such as the endangered albatross) was not consistently considered by the courts when sentencing. It is submitted that this subject must consistently be taken into consideration.

2. Second, the cases show a comparatively low level of fine when compared to the value of the catch. Due to the provisions in Article 73(2) of the 1982 Convention, the fine is the only option available as a sentence, and the Convention states that the fine must be 'reasonable'. However, IUU fishing is a multi million dollar international business, and the low level of fines imposed, compared to the value of the catch, must surely be seen as a joke.

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16 United Nations Convention on the Law of the Sea (done at Montego Bay, Jamaica) 10th December, 1982, and entering into force on the 16th November, 1994. Reprinted in (1982) 21 *International Legal Materials* 1261-1354.

17 Refer to Status of the Law of the Sea Convention at UN homepage: <http://www.un.org>, accessed 11th March, 2005.

18 The term IUU fishing first appeared in CCAMLR meetings conducted in the late 1990s.

19 The crisis of overfishing is most noteable in materials produced at (and following) the United Nations Conference on the Environment and Development (UNCED), also known as the Rio Earth Summit, 3–14 June, 1992, Rio de Janeiro, Brazil. United Nations Publication ISBN:92-1-100509. By 1994, when the LOSC came into effect, some seventy per cent of the world's marine capture fisheries were fully exploited, over-exploited or in a State of recovery — Food and Agriculture Organisation of the United Nations 1994:136).

3. Third, the current legal process allows the real environmental criminals — the beneficial owners of the fishing vessels, to escape the judicial process and sanctions. Furthermore, as the 'big fish' beneficial owners of the vessels will pay the moderate Australian court fines, there is no effective deterrence in the current court process. As the Davis report has noted:

> In some instances net profits received from one IUU fishing trip can exceed the value of the vessel being used to conduct the operation. Subsequent trips only add to the net profit. Under these circumstances, apprehension followed by vessel forfeiture, (even when combined with substantial fines) are factors usually internalized by the IUU operator as an operational expense. Another vessel is then purchased and the operation continues (Davis 2000:8).[20]

The need for some kind of effective deterrent has been recognized by the Australian courts when sentencing IUU offenders. In the 2001 *South Tome* IUU fishing case heard by the District Court in Western Australia, Justice Jackson gave an interesting discussion on the subject of deterrence. Noting that many IUU offenders have Spanish Galician[21] roots, Jackson J held:

> The deterrent effect that any sentence or order under consideration may have on the person is a matter to be taken into account. It is interesting that the *Crimes Act* does not refer to general deterrence. General deterrence is, however, an important part of sentencing. Notwithstanding its absence as a specific matter referred to in S. 16A, it is appropriate to be taken into account. As the prosecutor has pointed out, a number of recent offenders have all come from the same part of the north of Spain, and it is likely therefore that news of this penalty will become known to those who might be tempted in the future to offend in this way (District Court of Western Australia 2001:para j).

With the greatest respect to Justice Jackson, it is more likely that news of the meager fines, and Australian compliance with the protections offered by the Law of the Sea Convention, would encourage Galicians to engage in IUU fishing, rather than act as any form of real deterrent.

4. Deterrence and the case of 'The *Volga*'

Only one of the eight IUU seizure cases shows an attempt by Australia to be innovative and proactive in deterring the toothfish pirates. This is the case of the *Volga*. The price of this innovation was to land Australia in proceedings before the International Tribunal on the Law of the Sea (ITLOS).

The facts of the *Volga* case were as follows. The *Volga* was arrested by Australian authorities on 7th February 2002 for IUU fishing the Patagonian toothfish in the waters off Heard and McDonald Islands (The *Volga Case* 2002). A total of 131 tonnes of toothfish were found on board at the time of the arrest (The *Volga Case* 2002). The *Volga* was escorted to port in Fremantle, and arrived on 19th February, 2002. The vessel itself was detained, along with four crewmembers, one of whom died shortly afterwards.[22] The toothfish were sold for $1.9 million, and this amount was held in trust.

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20 The author cites ITLOS decision in *The Camouco* (*Panama* v *France*) Case Number 5, 7th February, 2000. (A Southern Ocean IUU seizure off the coast of the French Kerguelen Islands).

21 That is, from the north of Spain.

22 The ship's Master was a Russian national who died after consuming a bottle of cleaning fluid in the mistaken belief that it was alcohol. The three other crewmembers detained from the *Volga* were the Chief Mate, the Fishing Master and the Fishing Pilot, all of whom were Spanish nationals from the Galicia region of northern Spain. (Facts taken from the Australian Response to the *Volga* allegations, <http://www.itlos.org>, pp5–6.)

In accordance with Article 73 of the LOSC, Australia set a 'reasonable' bond of approximately $3.33million for the release of the *Volga.* This was comprised of:

- $1.92 million representing the agreed value of the *Volga*;[23]
- $.42 million representing an amount for potential fines against the three crew members;
- $1 million for the guarantee of non-repetition of IUU fishing by the *Volga* as monitored by Satellite surveillance (This is known as Vessel Monitoring and Surveillance or VMS).

VMS refers to a satellite-based system that may be used to determine the position of a vessel at any time, including when it is at sea (Stephens & Rothwell 2004:285). The VMS equipment would be installed on the *Volga* by the Australian authorities in order to monitor the location of the *Volga*. Provided that the *Volga* did not re-enter the Australian Exclusive Economic Zone during the period of the forfeiture proceedings, the one million dollar good behaviour insurance would be refunded.

Of particular interest for its attempt to provide deterrence was the fact that in addition to the above requirements, Australia refused to release the vessel unless information was provided as to the:

- ultimate beneficial owners of the *Volga;*
- names and nationalities of directors of Olbers Co. Ltd (the legal owners) plus any parent company of Olbers;
- names, nationalities and location of the manager(s) of the *Volga* operations;
- insurers of the vessel; and
- financiers of the vessel (if any) (Stephens & Rothwell 2004).

Over nine months later, on 2nd December, 2002 the Russian Federation filed an application against Australia in the International Tribunal for the Law of the Sea. Pursuant to Article 292 of the Law of the Sea Convention, the Russian Federation sought the immediate release of both the *Volga* and its crew. The case proved to be an international law test case for the 'good behaviour' bonds imposed by Australia. In other words, Australia's ability to proactively and unilaterally address deterrence, when the subject is not adequately addressed by the Law of the Sea Convention, was being challenged.

The ITLOS decision of 23rd December, 2002 was that Australia had *not* complied with the provisions of the Law of the Sea Convention which required prompt release upon the posting of a reasonable bond. Accordingly, Australia must promptly release the *Volga* in return for a bank guarantee of $1.92m (The *Volga Case* 2002).

The Tribunal's financial determination of $1.92million was equal to the agreed value of the *Volga*, and it represents the first item on the 'reasonable bond' list set by Australia. The sum was four times the valuation submitted by the Russian Federation (The *Volga Case* 2002). The ITLOS further declared that the Australian bond of $.42 million for fines was unnecessary, as the *Volga* crew had been released (The *Volga Case* 2002).

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23 This value included fuel and fishing equipment on board the vessel. The Russian Federation contended that the *Volga* had a value of AU$500,000.

For the purposes of this paper, most attention in the ITLOS judgment must be given to the non-financial conditions imposed by Australia for release of the vessel. These are the deterrence provisions that aim to monitor behaviour of the vessel and expose the beneficial owners behind the IUU industry. Here, the ITLOS judgment states:

> Besides requiring a bond, the Respondent [Australia] has made the release of the vessel conditional upon the fulfilment of two conditions: that the vessel carry a VMS, and that information concerning particulars about the owner and ultimate beneficial owners of the ship be submitted to its authorities.
>
> The Applicant [the Russian Federation] argues that such conditions find no basis in Article 73, paragraph 2, and in the Convention in general, because only conditions that relate to the provision of a bond or security in the pecuniary sense can be imposed. ....
>
> [The court finds that] the object and purpose of Article 73, paragraph 2, read in conjunction with Article 292 of the Convention, is to provide the flag State with a mechanism for obtaining the prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms. The inclusion of additional non-financial conditions in such a security would defeat this object and purpose (The *Volga Case* 2002).

Thus the tribunal held that the VMS requirements and the non-financial bonds were penalties which aimed to prevent future illegal activity, and this was beyond the object and purpose of Article 73(2) of the LOSC. Therefore the innovative 'deterrence' bonds that were set by Australia could not be enforced as they were seen as being beyond the scope of the Law of the Sea Convention.

As a closing note to the subject of the *Volga*, it will be recalled that the above discussion, raised three criticisms of the IUU Australian case law:

1. Lack of case law consistency in considering the environmental impact;
2. Financial penalties that do not reflect the value of the illegal catch; and
3. Lack of deterrence, particularly in stopping the beneficial owners of the IUU industry

It has clearly been seen in the *Volga* case that at the ITLOS level, the (point 3) beneficial owners remain undeterred, and the (point 2) financial penalty exactly mirrors the value of the illegal catch. However, some attention should also be given to the ITLOS consideration of the (point 1) environmental impact of IUU fishing. On this subject, the Tribunal remarked that it 'understands the international concerns about [IUU] fishing and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR,' but that the tribunal had a task to do, which was based only on the legal interpretation of Article 292 of the Law of the Sea Convention. Thus the Tribunal gave little weight, if any, to the overexploited fish stocks, the endangered seabirds, and the sustainability of an ecosystem (The *Volga Case* 2002).[24]

As well as considering the 'object and purpose' of Articles 73 and 292, the Tribunal would have done well to consider with equal weight the object and purpose of the Preamble to the Law of the Sea Convention which states, *(inter alia)*: 'the desirability of establishing through this Convention ...a legal order for the seas and oceans which will ...promote the conservation of their living resources, and the study, protection and preservation of the marine environment.'

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24 Note also Stephens & Rothwell 2002: 'The Tribunal therefore appears to have accorded little weight to the serious problem of IUU fishing or the uncontested evidence that the *Volga* was part of a fleet of vessels systematically violating Australian fisheries laws and CCAMLR conservation measures.'

5.Reforming International Law

Article 312 of the Law of the Sea Convention notes that 'after the expiry of a period of ten years from the date of entry into force of this Convention, State parties may ... propose specific amendments to the Convention.' The ten-year wait expired last year on 16th November, 2004. This paper submits that the provisions of Article 73, and the coastal State's ability to enforce management laws in its fishing zone, should be reformed.

Article 73 currently stands in that part of the Law of the Sea Convention that deals with rights and duties of the coastal State within the 200-mile Exclusive Economic Zone (EEZ). Thus, the coastal State currently has a *right* to explore, exploit, conserve and manage the living resources of the EEZ. It has a concurrent *duty* to promptly release (upon the posting of a reasonable bond) foreign vessels and crew that violate the fishery laws of the coastal State. It can be argued that the whole Law of the Sea Convention is outdated, ambiguous and in need of reform. It is submitted that this description clearly applies to Article 73 and illegal fishing in the Australian Fishing Zone. Consider for example, the following questions:

1. Is there a conflict between the Article 73 words of 'exploiting, conserving and managing' the living marine resources? Which of these provisions is to prevail? If they are of equal worth, how can the conflicting values be resolved?

This paper submits that such terminology must include recognition of sustainability. That is, exploitation, conservation and management must be sustainable, and then the provisions are not in such apparent conflict.

2. Whilst the coastal state is exploiting, conserving and managing the Patagonian toothfish fishery, what protections exist for the endangered albatross that are victims of the longliners catching the toothfish?

This paper submits that fisheries management under the Law of the Sea Convention must be premised on an ecosystem approach. In contemporary international law, the strongest recognition of the ecosystem approach comes from the 1992 UN Convention on Biological Diversity which defines the term as:

> Ecosystem and natural habitats management, to meet human requirements to use natural resources, whilst maintaining the biological richness and ecological processes necessary to sustain the composition, structure and function of the habitats or ecosystems concerned. [25]

One of the earliest applications of the 'ecosystem approach' is in the 1980 Convention that created CCAMLR. Here the Preamble provides for the need to protect the ecosystem of the seas surrounding Antarctica and to increase knowledge of its component parts. The articles of the CCAMLR extend to all marine living resources within the whole Antarctic ecosystem, including sea birds. This paper submits that the exploitation of living marine resources within various sections of the Law of the Sea Convention, should be reformed to formally recognize the ecosystem approach to sustainable management.

3. What is a 'reasonable bond or other security' in Article 73(2)?

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25 Fifth Conference of the CBD parties (COP5) Decision V6, May 2000. The term 'ecosystem approach (EA)' must be distinguished from 'ecosystem approach to fisheries (EAF)' as they are technically distinct terms. Note for example Garcia SM, *The Ecosystem Approach to Fisheries*, FAO Fisheries Technical Paper 443, Rome 2003, pp. 3–4.

This question was considered by Judge Oda in 1983, less than a year after the Law of the Sea Convention was opened for signature. He said:

> The reasonableness of a bond or other security can never be proved from an objective point of view (Oda 1983:749).

To demonstrate the Oda hypothesis, we need look no further than the *Volga* Case before the ITLOS. Having seen the majority judgment that bonds must be financial, there are two further dissenting judgments that should also be considered (The *Volga Case* 2002).[26]

First, the dissenting judgment of Judge Anderson held that a coastal State's duty to conserve marine living resources in its EEZ, together with the obligations of CCAMLR States to preserve the Antarctic, were relevant factors to determine what constitutes a 'reasonable bond'. The second dissenting judgment of Judge *ad hoc* Shearer went even further.[27] Judge Shearer held that the question of reasonableness in the *Volga case* could not be assessed in isolation from the 'grave allegations of illegal fishing in the context of the protection of endangered fish stocks in a remote and inhospitable part of the seas'. Furthermore, Judge Shearer noted that Article 292(3) of the LOSC did not prevent the Tribunal from examining *all the facts of a case* in order to determine the 'reasonableness' of the bond. Clearly, 'all the facts of a case' must include any deleterious impact on the ecosystem and its sustainability.

Eight Australian IUU fishing cases have seen a net value of illegal toothfish around $10 million. In the Southern Ocean, this is the tip of the iceberg. An Australian Antarctic Division report refers to an IUU Patagonian toothfish wholesale trade of $1 Billion (Southern Ocean Conservation Unit nd). These profit figures clearly demonstrate the absurdity of a system of justice that equates bond 'reasonableness' with money. If there is to be any form of effective deterrence in fisheries law enforcement, it is necessary for states to act innovatively and courts or tribunals to interpret broadly.

> 4. If the LOSC provides for 'arrested vessels and their crews', what international laws are broken by the beneficial owners of IUU fishing operations?

The answer is none. Tracing the 'big fish' or beneficial owners of IUU operations is difficult, but it can be done. Numerous instances exist of NGOs and investigative journalists pursuing the IUU trail in order to uncover the identities of those beneficial owners who control IUU fleets.[28] At present, the beneficial owners of IUU vessels do not fall under the Article 73 definition of 'arrested vessels and their crews', so they fall outside the international legal regime completely. This omission requires recognition and reform. If it is not included in a reformed law of the sea, then measures to expose the beneficial owners, such as those adopted by Australia in the Volga case,[29] must be supported by international courts and tribunals, not condemned.

The modern history of natural resources law and environmental law dates from the same period as the drafting of the Law of the Sea Convention — that is, the 1970s. Consequently, the subject of sentencing natural resource offenders is still emerging, and courts are unclear as to how environmental considerations should be weighed in sentencing. In the United

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26 See Dissenting Judgments.

27 Professor Ivan Shearer was chosen by Australia to participate as ITLOS Judge *ad hoc*. This procedure is permitted under Article 17(2) of the Statute of ITLOS.

28 Note for example ABC TV 2002: where investigative journalist Chris Masters traced one Patagonian toothfish operation to the beneficial owners of Sun Hope Investments based in Jakarta. Isofish and Greenpeace have been successful in exposing other corporations.

29 See text accompanying fn.27.

Kingdom, a Sentencing Advisory Panel has produced a sentencing guideline on environmental offences. Titled 'Environmental Offences: The Panel's Advice to the Court of Appeal' (United Kingdom Sentencing Advisory Panel nd), the report deals with specific environmental offences such as air / water pollution, illegal disposal of waste, illegal abstraction of water, and failure to meet recycling obligations. Whilst these subjects might appear to be superfluous to fishery offences, the Report does raise interesting considerations on measuring culpability of defendants accused of environmental offences. In paragraph 6, the Report notes that certain factors must be taken to enhance or aggravate culpability. This paper submits that three of these factors can be applied to allegations of IUU fishing. They are:

- The offence is shown to have been a deliberate or reckless breach of the law, rather than the result of carelessness;
- The defendant acts from a financial motive, whether of profit or cost-saving;
- The defendant's attitude towards the relevant environmental authorities (AFMA or CCAMLR) is dismissive or obstructive (United Kingdom Sentencing Advisory Panel nd).

Furthermore, these culpability factors should be equally applied to beneficial owners as well as the fishing crew.

The Sentencing Advisory Panel Report goes on to discuss sentencing. Their first recommendation is in support of the fine as the most appropriate sanction. This is based on the fact that environmental offences are 'non-violent and carry no immediate physical threat to the person.' Further, the level of fine should be fixed in accordance with the seriousness of the offence and the financial circumstances of the individual defendant (including the defendant's economic gain as a result of the offence).

It is submitted that the UK Sentencing report provides an excellent template for the way IUU fishing offences should be treated by the Law of the Sea Convention. IUU offenders (be they white collar beneficial owners or fishing crews) are deliberate with where they fish (or at least reckless with regard to sovereignty). They act from a financial motive of profit. They are dismissive or obstructive of management quotas set by the relevant fishery management authorities. These factors should enhance their levels of culpability, and their levels of fine.

Further, from the dissenting judgment of Judge Shearer in the *Volga* Case, culpability may also be assessed by examining all the facts of a case, including the deleterious impact of IUU fishing on the sustainability of an ecosystem.

Where the culpability of beneficial owners, legal owners and vessel crews is high, and custodial sentences are not a viable option, all convicted persons should be exposed and fined to the extent of their economic gain as a result of committing the IUU fishing offence.

6.Conclusion

On the 8th March, 2005 Australian Minister for Fisheries Senator The Honourable Ian Macdonald, announced that he was leaving Australia that day to attend a Ministerial meeting of FAO on the continuing problem of IUU fishing, plus an inaugural meeting of the Ministerial Task Force on Illegal Fishing on the High Seas (MacDonald 2005). These meetings are seeking a global solution to IUU fishing and the problem of 'organized criminal cartels (MacDonald 2005).' The Ministerial Press Release notes that 'it is only by

taking a united approach to clamping down on the crew-members, the owners and rogue flag states, that this problem will be overcome (MacDonald 2005).' With respect to the Minister and his best intentions, the current United Nations Law of the Sea Convention does not allow or encourage any State to 'clamp down' on crew members, legal or beneficial owners or the rogue flag states that encourage IUU fishing. Accordingly, the 'united approach' that the Minister speaks of, must be a multilateral approach to updating the Law of the Sea Convention so that it deters IUU fishing.[30]

This paper has argued that the problem of IUU fishing is expanding. The Law of the Sea Convention, which provides the framework convention for dealing with IUU fishing, is outdated, inadequate and does not address deterrence. Furthermore, when IUU fishing cases appear before ITLOS, the Tribunal is reluctant to look beyond a narrow interpretation of the words used in the LOSC. The only *legal* solution to this problem, (as distinct from solutions offered by the education of fishers, or trade-based economic measures such as the CCAMLR Catch Documentation Scheme[31]) is to change the law. This can be done by review of the existing law, new law, or a law that supplements the existing law. In conclusion, it is to be hoped that ministerial delegates attending the 2005 March and April international IUU fishing meetings will seize their opportunity to address the deterrence lacuna and other inefficiencies in the current legal regime for enforcement of fishery laws.

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30 Apart from the LOSC Article 312 review after 10 years, it would also be possible to draft a supplementary Agreement in order to review the inadequacies of the current LOSC legal regime. This has already been done in the 1995 UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (See 1995 34 *International Law Materials*) which came into effect in 2001.

31 See above at fn. 8. For further information refer to the CDS at the CCAMLR homepage: <www.ccamlr.org>.

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